BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

CRISTAL USA, INC.,

Employer

Case No. 08-RC-188482

-and-

INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL OF THE UNITED FOOD & COMMERCIAL WORKERS, AFL-CIO, CLC,

Petitioner

PETITIONING UNION'S RESPONSE AND OPPOSITION TO CRISTAL USA, INC.'s MOTION FOR RECONSIDERATION OF THE BOARD'S ORDER OR, IN THE ALTERNATIVE, TO CONSOLIDATE CASES

Now comes the Petitioner, the International Chemical Workers Union Council of the United Food & Commercial Workers, International Union, AFL-CIO, CLC (Union), by and through the undersigned counsel, and hereby files its opposition to the motion (Motion) of Cristal USA. Inc. (Employer) to reconsider its order in this case (Cristal I) denying the employer's request for review in the above-captioned matter, or, in the alternative, to consolidate this case with Case No. 08-RC-184947 (Cristal II), for the reasons set forth below, as well as for those previously argued in the Union's opposition (Opposition) to the employer's request for review (RFR) in this case.

ARGUMENT

A. The Employer's Belated Request to Consolidate May Not Be Entertained, is Misdirected, is Untimely, and Must be Rejected.

For the first time the Employer, as part of its Motion, seeks to have the above-captioned case consolidated with Case No. 08-RC-184947 pursuant to NLRB Rules 102.65(e)(1) and 102.72(a)(2). The Employer's request to consolidate may not be entertained by the Board, is misdirected, and untimely.

Under Rule 102.65(e)(1), "No motion for reconsideration... will be entertained by the Board ... with respect to any matter which could have been but was not raised pursuant to any other section of these rules..." Since the Employer previously could have requested that the NLRB General Counsel consolidate the cases at issue, its current request may not be entertained by the Board.

Also, the Employer's reliance on Rules 102.72(a)(1) and (2) for its consolidation motion *to the Board* is based on selective quoting, is misplaced, and misdirected. The Employer only quotes part of Rule 102.72, erroneously suggesting that it is the Board to which that Rule is directed. However, by its terms, the Rule is directed *to the General Counsel* who may permit consolidation, presumably if timely requested much earlier in the proceedings.

Nevertheless, the Employer is belated in its request to consolidate. The Rule that permits this untimely motion, Rule 102.65(e)(1), makes clear, as shown above, that any request for consolidation should have been made much earlier in the proceedings. Not having been previously requested of the General Counsel, the motion to consolidate cannot now be entertained by the Board, no extraordinary circumstances having been established. The Motion must be denied.

B. The Union's Response to the Employer's Summarization of the Legal Standard to Apply.

The Union concurs that Rule 102.65(e)(1) requires the Employer establish "extraordinary circumstances" before reconsideration of the Board's denial of its request for review may be granted. However, the Employer has failed to establish such extraordinary circumstances.

As previously shown, the Employer, while only partially quoting Rule 102.72, has belatedly and untimely misdirected, its consolidation request *to the Board*, rather than to the General Counsel.

C. The Union's Response to the Employer's Statement of Material Errors the Board Should Reconsider.

To support its claim of "extraordinary circumstances," the Employer specifically argues that the Board majority overlooked that Cristal purportedly showed that, given the "setting and circumstances presented here," which it contends are, in material respects, "unlike ones the Board has considered since changing the law," the Regional Director misapplied Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB 934 (2011), *enfd. sub. nom*., Kindred Nursing Centers East, LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013). However, in Specialty Healthcare, the Board explained that it merely was returning to its traditional community-of-interest standards and "overwhelming community-of-interest" framework *for the healthcare industry*, that it traditionally has used in other industries; the Board explained that it was not changing the law, but merely acknowledging that it may have used slightly varying verbal formulations for the "overwhelming" community-of-interest standard. *Id.* at 943-46. More recently, in Cristal USA, Inc., 365 NLRB No. 82n.1 (2017) the Board re-affirmed that this framework merely "adheres to well-settled precedent."

So, Cristal's assertion that "extraordinary circumstances" exist, because the facts and its

arguments here differ materially "since changing the law," are based on a false premise. The law *for this industry* has not changed materially. The traditional principles and analytical framework, even under Specialty Healthcare, are not materially different *for this industry* than previously. Thus, there are no extraordinary circumstances to justify reconsideration on *that* basis.[1/]

Moreover, Cristal cannot seem to decide whether it wants to challenge Specialty Healthcare, itself, or how the Regional Director applied Specialty Healthcare. In either case, it has not raised any new matters to justify reconsideration.[2/]

Cristal's request for reconsideration because the Regional Director purportedly overlooked, or failed to afford appropriate weight to, certain facts, in finding that the warehouse employees shared a sufficient community-of-interest to form a stand-alone unit, raises no new matters from those raised in its request for review. Instead, Cristal, as before, fails to sufficiently recognize – and even attempted to obscure from the Board (Opposition at 1-2n.1) -- that warehouse employees are not only in a separate department from production and maintenance employees, but that they

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[1/]Cristal specifically contends that the Regional Director inappropriately disregarded, or failed to give appropriate weight to, its argument that the warehouse employees share an overwhelming community-of-interest with the production and maintenance employees. Cristal also contends that Regional Director failed to appropriately consider the facts and circumstances presented in Cristal I and II, together (though it never previously requested consolidation of those cases). However, the Union already has shown that the Regional Director in this case appropriately found that the production and maintenance employees do not share an "overwhelming" community-of-interest with the warehouse employees in the "Union's Response and Opposition to Cristal USA Inc.'s Request for Review of the Regional Director's Decision and Direction of Election" (Opposition at 13–20). And, despite its assertions, Cristal has not advanced any new arguments to support its contention that the Regional Director failed to appropriately consider the facts and circumstances from both Cristal I and II. Cristal had the opportunity in the later warehouse case, Case 08-RC-188482, to submit, as it did, and argue from the transcript and argue from evidence from Case 08-RC-184947. *See, e.g.*, Employer's Exhibit 2. There is no basis to suggest that the Regional Director did not consider that evidence.

[2/]Cristal failed to preserve any right to challenge the Specialty Healthcare framework or standard. (Opposition at 2-3).

also fall under a completely different supervisory chain-of-command, including for disciplinary purposes, while also having their own "distinct wage scale." (DDE, p. 11, 12). Thus, on factors that are critical ***from the warehouse employees' focus*** – departmental structure, wages, and discipline – determinations are made, not only on a day-to-day basis, but on up through the corporate level, by different management than for the production and maintenance employees.

While Cristal (and the dissent) give little or no weight to these critical differences, the Regional Director, contrary to Cristal's criticism, did address its assertion that a warehouse unit, standing alone, was not sufficiently differentiated from the production and maintenance employees to constitute its own group. (DDE, p. 11). In rejecting that claim, he found that the petitioned-for employees have distinct job functions and perform distinct work separate and apart from the employees that Cristal seeks to include; that the petitioned-for warehouse employees' *primary* job responsibilities are performing the traditional functions of warehouse employees, including receiving materials for packaging and shipping finish products, at the warehouse, contrasting that to production employees, whose *primary* function is to work in the production facility and field, where they turned raw materials into final products, while maintenance employees are to service the facility, upgrade machinery and processes, and ensure that the plants are running effectively, efficiently, and safely. (DDE, p. 11).

Consequently, the Regional Director was on solid ground, when he found that the petitioned-for unit of warehouse employees was a "readily identifiable group" and that these employees shared a community-of-interest with each other. The Union previously has shown that the so-called "facts" on which Cristal relies, suggesting that the Regional Director overlooked, or failed to afford them appropriate weight, are not to the contrary. (Opposition at 8–12).

Cristal raises no new arguments to support its Motion other than to reiterate its claim that the Regional Director erred in finding that the production, maintenance, and warehouse employees share an overwhelming community-of-interest with each other. Indeed, much of Cristal's argument is either simply lifted from its RFR on this issue or merely re-worded. However, that simply is not sufficient to meet the test of "extraordinary circumstances" to support a request for reconsideration.

The Union already has rebutted Cristal's arguments that the employees share an overwhelming community-of-interest and need not repeat them. (Opposition at 13–20). Nevertheless, the Union again emphasizes that, in criticizing the Regional Director for purportedly incorrectly discounting the "fact" that the production, maintenance, and warehouse employees arguably share some of the same terms and conditions of employment, Cristal conveniently ignores major and important differences ***from the employees' perspective*** that the warehouse employees not only have separate training and experience requirements, but also have a separate and "distinct wage scale" and a completely separate supervisory line of authority on up to the corporate level, including disciplinary-decision-making, as well as at least some distinction and differences in overtime and vacation policies. L (T. 149, 167-72). Regardless of any overlap of any other conditions of employment, these major differences are particularly significant ***to the employees,*** the ones who seek to organize this ***employee*** organization.

The Union cannot emphasize enough that this organization is of the employees, by the employees, and for the employees, <u>not</u> for the Employer. Thus, *their* perspective and *these* considerations are, and always should be, of great importance, even if not controlling. The Regional Director's Decision gave appropriate consideration to these, as well as the other, factors.

As to Cristal's reconsideration request based on its argument that the petitioned-for unit is not conducive to effective collective bargaining, Cristal now belatedly relies on "evidence" from settlement discussions (Motion at 12−14), that it could have attempted to argue in its RFR (but did not). Again, the Board is precluded from considering such matters under Rule 102.65(e)(1) since it did not raise such evidentiary matters previously as part of its argument. Nevertheless, ICWUC/UFCW Organizer Heasley's settlement statements are of little import, particularly given their context, nor does his ambiguous testimony support the conclusion that Cristal seeks to draw from it.[3/] It is too much of a stretch and spin from a theoretical response, that bargaining with one unit may be simpler than bargaining with two units, to the unsupported contention that the Union recognizes the pitfalls of negotiating in multiple gerrymandered micro units. To the contrary. The Union already has shown there are no fractured, micro units here. (Opposition at 12). If anything, it is the Employer, not the Union, that established the warehouse employees in a different department with different training, a different wage scale, different equipment, different supervision, and different discipline decision-making on up to the corporate-level! Given such distinctions, Cristal has failed to show extraordinary circumstances why it cannot negotiate separately for the warehouse employees. Otherwise, Cristal's arguments raise no new arguments from its RFR on this issue to justify extraordinary circumstances for reconsideration.

[3/]Heasley, a non-attorney, was the only person representing the Union at the hearing at which Cristal's attorney called him as a witness. While Cristal's legal counsel obviously was aware that testimony about settlement discussions generally may be subject to objection and, thus, usually excluded from evidence, the Union had no one to object to this line-of-questioning while Heasley was on the stand. Given this context, the Board should give little, if any, weight to his testimony on that issue.

CONCLUSION

WHEREFORE, for the reasons stated above, the Union urges that Cristal's request for reconsideration, as well as its request to consolidate, be promptly denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2017, a copy of the foregoing was electronically filed using the Board's electronic filing system and served thereby on:

Allen Binstock, Regional Director
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